Supreme Court, U.S.
FILED
JUN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1454

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES HAMILTON, Petitioner

v.

STATE OF MISSISSIPPI, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

TO BE PRINTED

MICHAEL MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JOHN T. KITCHENS
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

Office of the Attorney General
Post Office Box 7459
Jackson, Mississippi 39282

Counsel for Respondent

QUESTION PRESENTED

Does the U. S. Constitution Amendment IV require a law enforcement officer to discontinue a search executed pursuant to a warrant which is otherwise valid except for a misdescription of the particular place to be searched when the search took place where the warrant clearly intended?

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
ARGUMENT	3
I. Notwithstanding the misdescription on the face of the warrant, a search of any residence or property other than Petitioner's was not possible.	3
CONCLUSION	13
CERTIFICATE	14

TABLE OF AUTHORITIES

CASE	PAGE
Application of Lafayette Academy, Inc., 610 F.2d 1 (1st Cir. 1979)	9
Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)	12
Dalia v. United States, 441 U.S. 238, 60 L.Ed. 2d 177, 99 S.Ct. 1682 (1979)	4
Hamilton v. State, 556 So.2d 685 (Miss. 1990)	1, 5-6, 8, 10-12
Maryland v. Garrison, 480 U.S. 79, 94 L.Ed. 2d 72, 107 S.Ct. 1013 (1987)	4, 5, 7, 12, 13
Sadie v. State, 488 So.2d 1368 (Ala. App. 1986)	9
State v. Majors, 430 So. 2d 183, 188 (La. App. 1983); writ denied, 435 So. 2d 438 (La)	9
State v. Santiago, 8 Conn. App. 290, 513 A.2d 710 (1986)	9
State v. Woratzeck, 130 Ariz. 499, 637 P.2d 301 (1981)	9
Steele v. United States No. 1, 267 U.S. 498 (1925)	6
United States v. Alexander, 761 F.2d 1294 (9th Cir. 1985)	10, 11
United States v. Brock, 667 F.2d 1311 (9th Cir. 1982)	9
United States v. Gahagan, 865 F.2d 1490 (6th Cir. 1989)	5, 8
United States v. Gilman, 684 F.2d 616 (9th Cir. 1982)	11
United States v. Johnson, 541 F.2d 1311 (8th Cir. 1976)	9
United States v. Johnson, 690 F.2d. 60 (3d Cir. 1982), cert. denied, 459 U.S. 1214, 103 S.Ct. 1212, 75 L.Ed 2d 450 (1983)	8
United States v. Whitney, 633 F.2d 902 (9th Cir. 1980)	6, 11
United States v. Whitten, 706 F.2d 1000 (9th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984)	11

United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982), cert. denied, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed.2d 83(1983) 9

STATUTE **PAGE**

28 U.S.C. 1257(3) 1

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

JAMES HAMILTON, Petitioner,
v.
STATE OF MISSISSIPPI, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Hamilton v. State, 556 So.2d 685 (Miss. 1990). A copy of the opinion is before the Court as an Appendix to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Ceirtiorari through the authority of 28 U.S.C. 1257(3). He has failed to do so.

STATEMENT OF THE CASE

On September 2, 1986, (R.E. 2) a search warrant was issued which accurately directed law enforcement officers to property that James Hamilton, Petitioner, admittedly solely owns and

controls. (R. 165-166) This warrant did in fact contain language on its face commanding the executing officers to search a two-story building located there, along with "all approaches and appurtenances thereto". (R.E. 2)

The warrant and the affidavit attached, also contains this pre-printed language:

> 5. The facts tending to establish the foregoing grounds for issuance of a search warrant are shown on a sheet headed "Underlying Facts and Circumstances" which is attached hereto, made a part hereof and adopted herein by reference. (R.E.2)

The "Underlying Facts and Circumstances" sheet handwritten and signed by the investigation officer states in its intirety:

> On September 2, 1986, David Gillespie, a deputy with the Clay County Sheriff's Department was advised by a confidential and reliable informant whose information has led to arrests and convictions in the past that cocaine is being kept and sold in the residence of James Hamilton in Rockhill, Oktibbeha County, Mississippi. This informant also advised that he saw a quantity of marijuana at the residence also. This informant advised that the cocaine sale transpired within the last 24 hours. (R.E.1)

A description of the two-story building only appears on the face of the warrant because the investigating officer, the affiant, believed there to be only one house on Hamilton's property, that this house was Hamilton's residence, and that he was keeping drugs there. (R. 161-162) Gillespie testified that when he viewed the property while driving by at dusk, only a two-story building could be seen. (R. 152)

When the officers arrived at the scene of the search they approached the two-story building, knocked on the door and received no reply. (R.348) The officers then proceeded to the single story residence less than forty feet away where they were met at the door by Hamilton. (R.348) At this time the warrant was served and executed. (R.309, 348) Various contraband and a large amount of cash were found. (R.313,316,317,318,333)

Testimony by Hamilton admits to ownership of the lot, the two-story and one-story buildings situated there, and that he has occupied both buildings. (R.165-166) He further testified that the single-story building is his residence. (R.177)

REASONS FOR DENYING THE WRIT

Because the petitioner has failed to demonstrate that the decision of the Supreme Court of Mississippi in this case conflicts with the reasoning exposited in prior decisions of this Court or any federal court of appeal concerning technical sufficiency of search warrants, no valid constitutional issue has been raised and, Therefore, the petition should be denied.

ARGUMENT

I. Notwithstanding the misdescription on the face of the warrant, a search of any residence or property other than Petitioner's was not possible.

This Court has interpreted the fourth amendment as requiring three things of a valid search warrant. First, the warrant "must be issued by neutral, disinterested magistrates." Second, it must be demonstrated to the magistrate by those seeking issuance that probable cause exists to believe that "the evidence sought

will aid in a particular apprehension or conviction for a particular offense". Lastly, warrants must particularly describe the things to be seized and the places to be searched. Dalia v. United States, 441 U.S. 238, 255, 60 L.Ed. 2d 177, 99 S.Ct. 1682 (1979). Petitioner takes no issue with the first two requirements, only the third. Claiming that the warrant failed to sufficiently particularize the premises to be searched and using Maryland v. Garrison, 480 U.S. 79, 94 L.Ed. 2d 72,107 S.Ct. 1013 (1987), as the mainstay of his argument.

His argument rests entirely on the supposition that the instant search occurred in a place different from that specified in the warrant. Petitioner Hamilton contends that when the executing officers were informed of what he perceived to be their mistake, they were then obligated to discontinue the search. If, in fact, the officers had gone to the wrong premises they surely should have taken their warrant elsewhere. But one fact taken out of context and applied to a partial holding taken out of context is not basis for argument. While Garrison parallels this case to some extent factually and the reasoning applied by this Court pertains here, other decisions of this Court and federal courts of appeal must be applied in order to address the totality of the circumstances.

Here, as in Garrison, there is no question that a valid warrant based on probable cause issued. Nor is the Petitioner claiming that the officers involved failed in their duty to conduct a reasonable investigation, including verification of the

information provided by a reliable confidential informant. Hamilton v. State, 556 So. 2d 685, 690 (Miss. 1990). The informant told the investigator, David Gillespie, that he had seen a drug buy at Hamilton's residence within the past twenty-four hours. Hamilton, 556 So. 2d at 686. Gillespie testified at the suppression hearing that even after driving with the informant by the property owned by Hamilton, he thought there was only one house on the plot. Other testimony supported the reasonableness of this conclusion. 556 So. 2d at 686.

The analysis, as per Garrison, then is directed at the language of the warrant itself, its supporting affidavits, and what these documents indicated as the intended place to be searched. 480 U.S. at 82.

Petitioner believes the warrant issued in this case to be analogous to a blank warrant. Indeed, the "manifest purpose of this particularity requirement was to prevent general searches", and to deter police officers from conducting "wide-ranging exploratory searches". 480 U.S. at 84. This warrant, though, was anything but blank, nor was it of general character authorizing an "exploratory search". A warrant must be read in its entirety, with the attached affidavits and other supporting documents. United States v. Gahagan, 865 F.2d 1490, 1497 (6th Cir. 1989).

The warrant to search the Petitioner's residence gave precise directions to the location of Hamilton's property and a description of a two-story building mistakenly thought to be his residence. The question then, as in Garrison, is "whether that

factual mistake invalidated a warrant that undoubtedly would have been valid if it had reflected a completely accurate understanding" of the layout of the Petitioner's property. 480 U.S. at 85. That question is answered here in the negative. "It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended". Steele v. United States No. 1, 267 U.S. 498, 503 (1925).

Reasonable effort includes not only reading the warrant but also the attached affidavits. This warrant expressly incorporated by reference the affidavit. In pre-printed language on both the warrant and affidavit, a sheet headed "Underlying Facts and Circumstances" was also expressly incorporated by reference. Hamilton, 556 So.2d at 686-687. When taken in their totality, all these documents clearly indicated that the residence of James Hamilton, along with "all approaches and appurtenances thereto," was the intended place to be searched.

In United States v. Whitney, 633 F.2d 902 (9th Cir. 1980), the appellant argued that the warrant was invalid because it described the place to be searched as a "single-family dwelling" when in fact it was a two-family residence. This facial discrepancy occurred because the investigating officers were unaware of the existence of this condition until actual entry was made. 633 F.2d at 907, 908. Because the appellant, Whitney, had full control of the house, the court decided that officers had probable cause to search the entire residence. And that without

evidence in the record of police misconduct, deception, or misstatement in securing the warrant, the search is valid. 633 F.2d at 908.

No such evidence exists here either. Nor is it at issue that sufficient probable cause existed. Petitioner admits to ownership and control of both the two-story building and the one-story building, and the property on which they are situated. (R. 165-166). This fact is what distinguishes Garrison from this case. McWebb did not have complete control over the third floor.

The officers were compelled to stop the search of Garrison's apartment at the time they realized this. 480 U.S. at 87. This Court noted that the "objective facts available to the officers at the time suggested no distinction between McWebb's apartment and the third-floor premises". 480 U.S. at 87. As a result, prior to the discovery of the mistake, the officers were found to have acted reasonably in executing the warrant upon the entire floor. 480 U.S. at 87.

At no time during the search of Hamilton's property did they attain the level of unreasonability proscribed in Garrison. Therefore, the officers were not required to discontinue the search at that point when Hamilton pointed out the technical flaw in the description of the building to be searched. It was reasonable for the officers to conclude, based on the warrant and attendant documents, that Hamilton's residence located on property owned and controlled by Hamilton was the place intended

to be searched; not just an unoccupied two-story building located within forty feet of his residence, which is appurtenant to and under the same ownership and control.

The principle of incorporation by reference into a warrant of affidavits and other documents had the effect of curing the technical flaw in the description of the particular place to be searched:

> "In determining whether the description given the executing officer was sufficiently detailed, it is of course important initially to examine the description which appears in the warrant itself. However, if that description is inadequate, it is appropriate to look to the description appearing in the warrant application or affidavit if it is clear that the executing officers were in a position to be aided by these documents, as where they were attached to the warrant at the time of execution and incorporated therein by reference".

Hamilton, 556 So.2d at 688, citing 2 LaFave, Search and Seizure, A Treatise on the Fourth Amendment, 4.5(a) p. 209 (2d ed. 1987). (emphasis in original)

The Supreme Court of Mississippi in adopting this principle is in accord with the Sixth Circuit which likewise adopted it in United States v. Gahagan, 865 F.2d 1490, 1497 (6th Cir. 1989), cert. denied, ___ U.S. ___, 109 S.Ct. 3242, 106 L. Ed. 2d590 (1989), holding that an insufficiency in a warrant can be cured by an attached affidavit that is incorporated by reference. Other jurisdictions have adopted this principle. See United States v. Johnson, 690 F.2d. 60, 64 (3d Cir. 1982), cert. denied, 459 U.S. 1214, 103 S.Ct. 1212, 75 L.Ed 2d 450 (1983); United States v. Wuagneux, 683 F.2d 1343, 1350-51 (11th Cir. 1982),

cert. denied, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed. 2d 83(1983); United States v. Brock, 667 F.2d 1311, 1323 (9th Cir. 1982); Application of Lafayette Academy, Inc., 610 F.2d 1, 4 (1st Cir. 1979); United States v. Johnson, 541 F.2d 1311, 1315 (8th Cir. 1976); State v. Santiago, 8 Conn. App. 290, 513 A.2d 710, 717 (1986); Sadie v. State, 488 So.2d 1368, 1372-74 (Ala. App. 1986); State v. Majors, 430 So. 2d 183, 188 (La. App. 1983); writ denied, 435 So. 2d 438 (La); State v. Woratzeck, 130 Ariz. 499, 637 P.2d 301 (1981).

Several things are apparent in this case. Probable cause existed to search all buildings on the plot. The confidential informant had been consistently reliable in the past. The investigation leading up to the warrant was conducted by officer Gillespie in a reasonable manner. The attached affidavit and the "Underlying Facts and Circumstances" sheet were an honest presentation of the facts as Gillespie believed them to be. All thee documents, the warrant, affidavit, and "Underlying Facts and Circumstances", clearly indicated to the executing officers that not only was the two-story building one of the particular places to be searched, but also all approaches and appurtenances thereto, and the residence of James Hamilton. The directions on the face of the warrant could not have, and did not, direct the officers to anyone else's property but the Petitioners'. Petitioner admitted at the time of the search to ownership and control of the property and all the buildings situated there. Therefore, from the warrant and attached documents, and based on

the Petitioners own words, the executing officers reasonably believed that they were at the residence of James Hamilton and that this was without a doubt the particular placed intended to be searched. It was not unreasonable for the officers to believe that the two buildings, served by a common driveway, within forty feet of one another, and under the singular control of the person named on the warrant, were subject to search. The warrant and supporting documents amply particularized that it was intended that Hamilton's place was to be searched.

The Ninth Circuit in United States v. Alexander, 761 F.2d 1294 (9th Cir. 1985), addressed a contention that a warrant was overbroad. Alexander asserted that the warrant was too wide-ranging because it did not mention the small trailer where he was found, and because it authorized the search of his entire forty acre ranch instead of a smaller portion of it. 761 F.2d at 1300.

Alexander did not contend that the ranch was improperly identified. The Alexander court found probable cause existed to search the whole ranch. 761 F.2d at 1301. Hamilton likewise does not claim his plot of land was misidentified. Similarly, in this case, the Supreme Court of Mississippi found no evidence in the record contradicting that officers had probable cause to search the Petitioner's residence. Hamilton, 556 So.2d at 690.

Other parallels between the two cases exist. Alexander owned and admitted to control over the property and everything situated upon it. Also, he was found living on that same

property in a place not listed in the warrant. The Ninth Circuit held that the warrant's failure to mention the trailer did not make it overbroad. Alexander, 761 F.2d at 1301. The warrant was held valid because probable cause existed to search all of the buildings on Alexander's ranch and because all the buildings there were under his control. 761 F.2d at 1301, citing Whitney, 633 F.2d 907, 908.

The Alexander court took note that in Whitney, they upheld the challenged warrant which described only a single dwelling when in fact two dwellings existed on the same premises, where the defendant enjoyed full control over both. Alexander, 761 F.2d at 1301, citing Whitney, 633 F.2d at 907-908. No evidence was found that the officers had prior knowledge of the two dwellings. Whitney, 633 F.2d at 908.

Similarly, that court held that a "warrant is valid when it authorizes the search of a street address with several dwellings if the defendants are in control of the whole premises, if the dwellings are occupied in common, or if the entire property is suspect". Alexander, 761 F.2d at 1301, citing United States v. Whitten, 706 F.2d 1000, 1008 (9th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1593, 80 L.Ed. 125 (1984); United States v. Gilman, 684 F.2d 616, 618 (9th Cir. 1982).

Hamilton was found in a building, his residence, not listed directly on the warrant. Hamilton, 556 So.2d at 687. The warrant contained language directing officers to search approaches and appurtenances. (R.E.3) Hamilton has not contended

that his plot of land was misidentified, but has in fact admitted to ownership and control over it and the buildings situated there. 556 So.2d at 689. The Supreme Court of Mississippi upheld the findings of probable cause below. 556 So.2d at 690. Their holding in this case is directly in line with the decisions of this Court and other federal courts of appeal.

The Supreme Court of Mississippi noted that this Court held in Garrison, 480 U.S. at 87, that the constitutionality of the officers conduct must be judged in light of the information available to them at the time they acted. Hamilton, 556 So. 2d at 689. A warrant's validity "must be assessed on the basis of the information that the officers disclosed or had a duty to discover and to disclose to the issuing magistrate". 556 So.2d at 689, citing Garrison, 480 U.S. at 87.

There was every reason for the officers to believe that a search of both buildings on Hamilton's premises was warranted. In Whitney, 633 F.2d at 908, the court there could not say, under circumstances similar to those presented here, that "either the informant's characterization or the officers' understanding was unreasonable". The same logic applies to this case. The record is bereft of any evidence, nor has the petitioner claimed, that the officers acted in any manner other than in reasonably good faith. If it is assumed that any mistake was made, or that the warrant was defective for any reason, then the following statement from Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949), applies:

> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability".

Garrison, 480 U.S. at 87, n.11.

CONCLUSION

Respondent respectfully submits that because the Supreme Court of Mississippi's decision in this case is squarely in line with prior decisions of this Court and other federal courts of appeal, the petition for writ of certiorari should be denied.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JOHN T. KITCHENS
SPECIAL ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

Attorneys for Respondent

BY: John T. Kitchens

Office of the Attorney General
Post Office Box 7459
Jackson, Mississippi 39282
Telephone: (606) 359-1570

CERTIFICATE

I, John T. Kitchens, a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be maoiled, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Brief in Opposition to the following:

Jim Waide, Esquire
Post Office Box 1357
Tupelo, Mississippi 38802

This, the 11th day of June, 1990.

John T. Kitchens
JOHN T. KITCHENS